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IN THE

Supreme Court of the United States

OCTOBER TERM, 1924

No. [illegible], Original

THE STATE OF NEW MEXICO,

vs.

THE STATE OF COLORADO

BRIEF IN BEHALF OF THE STATE OF COLORADO.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1924

No. 12, Original

THE STATE OF NEW MEXICO,

vs.

THE STATE OF COLORADO

BRIEF IN BEHALF OF THE STATE OF COLORADO.

INTRODUCTION.

This original suit was commenced by New Mexico for the purpose of causing the ancient and accepted boundary between Colorado and New Mexico to be changed to the line of a new *ex parte* survey not acceptable to Colorado. Were the contention of New Mexico to be sustained it would take a considerable strip of territory from Colorado

and place it in New Mexico, without the consent of Colorado; would result in the creation of an entire new boundary between these states; would open for dispute the boundary between Colorado and Oklahoma and would subject to question the boundary between Kansas and Oklahoma, because the Kansas-Oklahoma boundary, the Colorado-Oklahoma boundary and the Colorado-New Mexico boundary all are fixed as the 37th parallel of north latitude.

The suit is not brought for the purpose of restoring and remarking an ancient and accepted boundary between the states. Its purpose is to cause a recent fixation of the 37th parallel of north latitude to be declared the boundary between the litigant states, without regard to the location and monumenting of said parallel by the United States in 1868 and 1874 (when both states were territories) since hitherto recognized and accepted as the true boundary by the United States and the territories and, later, by the states.

Colorado denies that the line of the new survey is the boundary between the states; asserts that the ancient, recognized and accepted line surveyed and monumented in 1857, 1859, 1868 and 1874, is the true boundary and in her cross-bill prays that the same be relocated and remonumented, under the direction of the Court, by reason of the fact that a large number of the monuments originally established along said boundary were mutilated or destroyed by the engineer who surveyed the new line now sought to be imposed upon Colorado.

STATEMENT.

The 37th parallel of north latitude between the 25th and 32nd meridians of longitude west of Washington, as located and monumented in 1857, 1859, 1868 and 1874, constitutes the boundary between Colorado and Oklahoma and between Colorado and New Mexico.

The boundary between the States of Colorado and New Mexico was established by the United States when Colorado and New Mexico were territories, under surveys by Ehud N. Darling in 1868 and John J. Major in 1874. Darling's survey extended from the Macomb monument (hereinafter mentioned) westward to the northwest corner of New Mexico and the Major survey extended from the Macomb monument eastward to the Preston monument, located on the line of the Major survey, the northeast corner of New Mexico.

The initial determination of the location of the 37th parallel of latitude, along the southern boundary of Colorado, was made in 1857, under the direction of Col. Joseph E. Johnston, U. S. Army, who established the same as far west as his determination of the intersection of said parallel with the 103rd meridian west of Greenwich. In 1859 Captain Macomb, U. S. Army, under orders from the War Department, established a new monument at a point 9781.2 feet east of the Johnston monument because of errors made in Col. Johnston's determination. The monument so erected by Captain Macomb was thereafter known as the "Macomb Monument" and was considered the northeast corner of New Mexico until 1881.

May 22, 1868, pursuant to authority of an Act of Congress approved March 2, 1867 (14 Statutes at Large, 476), Ehud N. Darling, U. S. Surveyor and Astronomer,

entered into an agreement with the Commissioner of the General Land Office, acting for and on behalf of the United States, to "well, truly and faithfully establish by astronomical observations the 37th parallel of North Latitude between the 103rd and the 109th degrees of West Longitude from Greenwich, which is a boundary common to New Mexico and Colorado Territories as defined by Acts of Congress approved September 9th, 1850, vide Section 2, Statutes at Large, Vol. 9, page 447, and Feby. 28th, 1861, See Section 1 of 'An Act to Provide Temporary Government for the Territory of Colorado', Statutes at Large, Vol. 12, page 172" (fol. 690). Darling thereafter surveyed and monumented said boundary between the Territories of Colorado and New Mexico in conformity with his contract and the specifications thereto attached, including the erection of eleven astronomical stations (fols. 690-709); and his survey, location and monumenting of that portion of the boundary between said territories was accepted by the United States. His survey commenced at the Macomb monument and extended to the intersection of the 37th parallel of north latitude with the 109th degree of west longitude from Greenwich, the southwest corner of Colorado and the northwest corner of New Mexico.

In 1874 John J. Major, U. S. Astronomer and Surveyor, completed the survey, establishment and monumenting of the true position of the south boundary of the Territory of Colorado between the 25th and 103rd meridians of longitude west of Washington and Greenwich, respectively, in conformity with his contract of June 2, 1873, with the United States, acting by and through the Commissioner of the General Land Office. He commenced at the southwest corner of the State of Kansas and ran westerly, monumenting the line as he proceeded, to the Macomb

monument, which he noted as the point of commencement of the Darling Survey of 1868 (fols. 600, 609, pp. 487, 493). The Major survey was approved by the Commissioner of the General Land Office and his monuments have since hitherto been recognized as the markings of the boundary between the Territory of Colorado and Indian Territory, later the State of Colorado and the State of Oklahoma, and since 1881, as a part of the boundary between the State of Colorado and the Territory of New Mexico, and, later, between the two states.

The State of Colorado was admitted into the Union August 1, 1876, pursuant to Act of Congress, approved March 3, 1875 (18 Statutes at Large, 474). By both said Enabling Act and by the Constitution adopted by the People of Colorado, under which Colorado was admitted into the Union by proclamation of President Grant, the 37th Parallel of North Latitude between the 25th and 32nd Meridians of Longitude west from Washington was fixed as the southern boundary of the state.

The Macomb monument was recognized as the northeast boundary of New Mexico until the year 1881. During that year Chaney & Smith established the "Cimarron Meridian" which intersected the Major line two miles and 40.53 chains east of the Macomb monument. In June, 1900, Levi S. Preston, a U. S. Deputy Surveyor, working under agreement and instructions, dated October 25th, 1899, with the Surveyor General of the United States for New Mexico, which contract and instructions had theretofore been approved by the Commissioner of the General Land Office of the United States, retraced, remarked and reestablished the line theretofore established and monumented by said Major in 1874, from the Macomb monument easterly for a distance of two miles and 40.53 chains to the intersection of the Major line with the Cim-

arron Meridian, at which point and in conformity with his contract and instructions, Preston erected a monument (thereafter known as the "Preston Monument") as and for the northeast corner of the then Territory of New Mexico, and as and for the intersection of the 37th parallel north latitude with the Cimarron Meridian, the boundary between the States of New Mexico and Oklahoma. Preston's field notes and survey for this portion of the boundary between Colorado and New Mexico were accepted and approved by the United States Surveyor General for New Mexico (Vol. 611, p. 494). Since 1874 and since the retracing, remarking and reestablishing of the Major line between the Macomb and Preston Monuments by Preston, said line has been recognized and accepted by the United States, by the Territory of Colorado and the Territory of New Mexico, and, later, by the States of Colorado and New Mexico as a part of the boundary between said territory and state and between said states.

In 1897 some question arose respecting the location of the boundary (Darling line) between astronomical monuments 6 and 8 established by Darling in 1868, in the vicinity of Edith, Colorado, near the point of the intersection of the boundary with the Navajo River and over two hundred miles west from the Macomb Monument. The location of Darling's astronomical station No. 7 and some of the mile posts (which had disappeared) along the boundary between his astronomical stations 6 and 7 became a subject of dispute.

For the purpose of setting at rest any possible doubt respecting the true location of the Darling line in the vicinity above mentioned, in 1901, the General Assembly of the State of Colorado passed an Act (Session Laws, Colo., 1901, p. 78) authorizing the Governor to appoint a Commissioner whose duty it should be to resurvey and reestablish the

line surveyed and established by Darling in 1868, between his astronomical monuments Nos. 6 and 8. This commissioner was authorized to act in conjunction with a commissioner to be appointed by authority of the Territorial Assembly of New Mexico and with any person or commissioner appointed and designated by the Interior Department of the United States, or either thereof. In the event no such commissioners were appointed by the Territory of New Mexico, or by the United States, before July 15, 1901, the commissioner for Colorado was then directed to resurvey, reestablish and remonument the Darling line, in the locality mentioned, without awaiting the appointment of commissioners for New Mexico or the United States (fols. 949-952, pp. 668-670). Charles A. Johnson was appointed commissioner for Colorado. The United States and the Territory of New Mexico failed and neglected to appoint commissioners. Johnson accordingly proceeded to resurvey and reestablish the Darling line between astronomical monuments 6 and 8 and thereafter made report to the Secretary of State, of the State of Colorado (fols. 953-961, pp. 670-673). Nothing came of the Johnson survey other than his investigation and report to the Secretary of State of Colorado, by reason of the failure of New Mexico and the United States to co-operate in the work.

Charles H. Johnson found a "jog" or angle in the Darling line easterly from Astronomical Monument No. 7 (fols. 956-957, pp. 671-672). This "jog" or defect has a marked similarity with the defect in the boundary between Wyoming and Montana and is similar to discrepancies occurring in the boundaries between a number of the states (fols. 615-618, 687, pp. 496-498, 528). As we shall hereafter observe, it was corrected and set at rest by William C. Perkins, U. S. Surveyor, in 1917 (fols. 1052-1118,

733-792, and map following p. 792). Since 1868 the Darling line in the vicinity under consideration has been and still is the recognized and accepted boundary.

Investigations made by the General Land Office in 1899, 1900 and 1901, for the purpose of determining the status of certain conflicts of lands patented to or entered by settlers under the Colorado and New Mexico official plats, disclosed that in addition to the obliteration of monuments, some errors of alignment, measurement and position existed in that portion of the Darling line above mentioned and that these conditions were responsible for overlaps in the Colorado and New Mexico public land surveys which had resulted in conflict of claims on the ground (fols. 890-948, 1121, pp. 631-667, 793).

As a result of the above disclosure of the condition of the Darling line, Congress, by Act of July 1, 1902 (32 Stats., 552, 574) authorized "the resurvey and reestablishment, on the line of the thirty-seventh parallel of north latitude, of the boundary line between the State of Colorado and the Territories of New Mexico and Oklahoma, which is coincident with said parallel between the twenty-fifth and thirty-second degrees of west longitude from Washington".

July 7, 1902, Howard B. Carpenter, U. S. Surveyor and Astronomer, entered into a contract with the United States for the resurvey and reestablishment of the thirty-seventh parallel of north latitude between the twenty-fifth and thirty-second degrees of west longitude from Washington. The work was commenced in September, 1902, and completed in October, 1903, and was accepted by the General Land Office. On December 19, 1908, the joint resolution passed by the 60th Congress (S. R. 78) to establish "the boundary line between the States of Colorado

and Oklahoma and the territory of New Mexico", along the line of the Carpenter survey executed under authority of the Act of July 1, 1902, was vetoed by President Roosevelt upon the ground that the Carpenter survey, if adopted as the south boundary of Colorado, would "remove from the jurisdiction of that state and add to the Territory of New Mexico a strip along nearly the whole southern boundary of said state, in which there are located at least five post offices and an appreciable number of inhabitants" and for the reason that "no action has been taken by the Legislature of the State of Colorado consenting to or accepting the location of the boundary as proposed in this resolution" (vols. 1151-1152, pp. 824-825). No further action was taken by Congress and the resolution failed of adoption.

New Mexico claims in this suit that the line surveyed by Howard B. Carpenter under authority of the Act of Congress of July 1, 1902, and disapproved by Congress, is the boundary between Colorado and New Mexico. If the claims of New Mexico are valid it follows that the Carpenter survey also marks the boundary between Colorado and Oklahoma, for the reason that the Carpenter survey extended from the southwest corner of Colorado to the west line of Kansas and, by the terms of the Act, was sought to be made to apply to Colorado and Oklahoma as well as to Colorado and New Mexico.

The line established by John J. Major in 1873-1874 from the southwest corner of Kansas to the Macomb monument, along the line of the initial determination made in 1857 by Col. Joseph E. Johnston, has been and now is the recognized and established boundary between Colorado and Oklahoma (formerly Indian Territory) and between Colorado and New Mexico from the Preston monument to the Macomb monument. The Darling line since 1868

has been and now is (except as disputed by the bringing of this suit) the recognized and accepted boundary between the territories and later between the States of Colorado and New Mexico. It is now sought to substitute the new line run by Carpenter in 1902-1903 for these ancient, recognized and established boundaries. New Mexico contends that the Carpenter line is a more accurate (although not technically exact) fixation of the thirty-seventh parallel of north latitude than is the long recognized boundary, between Colorado and New Mexico, established and monumented by Major and Darling and that, therefore, the Carpenter line is the boundary although said line has never been accepted or recognized by Colorado and failed of approval by Congress.

The Carpenter survey was not an exact fixation of the 37th parallel. Tests made by the official inspector for the General Land Office show that Carpenter's astronomical monument No. 5 is 14 chains too far north (pp. 582-583). This deviation is nearly one-half as great as the jog in the Darling line at Ewell Canyon. If the boundary is to be moved to the Carpenter line from its long accepted location, a subsequent removal will be necessary when a still more accurate survey has been made. As the boundaries between most of the states were originally determined under adverse conditions and before the improvement of instruments, few, if any, of the parallels and meridians are determined with exactitude, and the recognition of the principle contended for by New Mexico would disturb practically all of these long established boundaries (fols. 614-619, pp. 496-498. See, also, pp. 5-28).

The Act of the Colorado Legislature of 1901, above referred to, authorized the Commissioner for Colorado, in conjunction with commissioners for the Territory of New

Mexico and the United States, "to resurvey and reestablish" the boundary between Colorado and the Territory of New Mexico "as heretofore surveyed and established by the said Darling" between his astronomical monuments numbered 6 and 8. Had the United States and the Territory of New Mexico accepted the offer thus made by Colorado and had the commission so composed proceeded to resurvey and reestablish the portion of the Darling line mentioned in the Act of the Colorado Legislature and had the results of their resurvey been accepted by proper legislative and congressional acts, the resurvey and reestablished lines would have been fixed by compact. But the United States and the Territory of New Mexico did not join. They ignored the offer of the Colorado Legislature.

This offer by the Colorado Legislature was not a consent by that state to a complete new fixation of the whole or any part of the southern boundary of the state. It was limited to a resurvey and reestablishment of a small portion of the Darling line and included no other part of the boundary.

The Act of Congress of July 1, 1902, provided for a "resurvey and reestablishment, on the line of the thirty-seventh parallel of north latitude, of the boundary line between the State of Colorado and the Territories of New Mexico and Oklahoma" along the entire south boundary of the State of Colorado. It was probably the intent of Congress to resurvey and reestablish the then existing boundaries between Colorado and the Territories of New Mexico and Oklahoma, as originally established by Major and Darling. But in the contract with Howard B. Carpenter, the Commissioner of the General Land Office directed Carpenter to proceed to make a new and independent fixation of the thirty-seventh parallel of north latitude from the southwest corner of Colorado to

the west boundary of Kansas and, by the instructions appended to the contract, directed Carpenter not only to set a complete new line of astronomical monuments and mile posts, but directed him to find and obliterate "all evidences of corners or monuments set by Darling on the south boundary of Colorado" but to "leave standing the monuments now standing on the line between Colorado and Oklahoma, except those set by Darling" (fol. 14, p. 7). In executing his contract, Carpenter sought out and defaced, obliterated or destroyed a large number of the Darling monuments but, fortunately did not destroy all of them or completely erase the evidences of those he did seek to destroy, and in all cases where he records the defacement or destruction he gives the location of such monuments by bearing references to mile posts or monuments established by Carpenter in his survey. As a result, the General Land Office has been enabled to restore a considerable number of the monuments obliterated or defaced by Carpenter and the location of the remainder is capable of ascertainment by reference to the monuments and mile posts along the Carpenter line. The Carpenter line commenced at the southwest corner of Colorado, which point is coincident with the terminus of the Darling survey in 1868, and ran thence easterly across the south portion of Colorado upon a line ascertained from astronomical observations by Carpenter, independent of the observations and monuments established by Darling and Major. The line so run by Carpenter lies for the most part northerly from the Darling and Major lines and intersected the west boundary of Kansas 40.34 chains north of the long established southwest corner of Kansas. If adopted the effect would be to remove a strip of territory from along the south border of Colorado and to place it in the states of New Mexico and Oklahoma, leaving a discrepancy of 40.34 chains at the

southwest corner of Kansas between the location of the 37th parallel as it now constitutes the boundary between Kansas and Oklahoma and the location of the thirty-seventh parallel between Oklahoma and Colorado along the line established by Carpenter. (See fol. 15, p. 8, and Colorado Exhibits 6 to 16, incl., side fols. 719-729.)

Colorado never consented to the independent survey made by Carpenter and never accepted and has always ignored the boundaries and monuments set by him. It has continued in its exercise of sovereignty down to the long established boundary marked and monumented by Major and Darling, without regard to the Carpenter Survey. New Mexico, other than for the bringing of this suit, has never sought to exercise her sovereignty north of the Major and Darling line.

The monuments and mile posts established by Carpenter during his survey are still in existence and although not recognized by either of the states or by the United States, are the subject of some confusion, but should not be destroyed until restoration has been made of all the Darling monuments and mile posts destroyed or defaced by Carpenter.

In 1917, William C. Perkins, U. S. Surveyor, under authority and direction of the Commissioner of the General Land Office, made a resurvey and restoration of that part of the boundary line between Colorado and New Mexico, embraced between Darling's 203rd mile corner and his 8th Astronomical Monument (241st mile corner), as surveyed by Darling in 1868. This restoration covered that portion of the line which includes the "jog" or angle above referred to and which was the subject of dispute as a result of the inability of the people in both states to ascertain the exact location of the Darling line.

Perkins completely restored the Darling line, according to the official records of the Darling survey, and prepared a plat showing such restoration and resurvey. He established each mile post by setting an iron post three feet long and properly marked and reestablished the 7th astronomical monument, making complete field notes which are embodied as a part of the records in this case (fols. 1033-1117, pp. 714-792, and map, fol. 1119). Since such reestablishment of the disputed portion of the Darling line by Perkins all ambiguities have been removed and the location of the boundary between the states definitely marked on the face of the earth.

All public land surveys by the United States have closed on the Darling and Major lines since 1868 and 1874, with the exception of one or two township surveys made subsequent to 1902 and prior to 1908 in the vicinity of the "jog" near Darling's 7th astronomical station and which surveys have since been corrected to close on the Darling line. The United States has considered the Darling-Major line to be the true boundary between the Territories of Colorado and New Mexico and later between the States, for all executive and administrative purposes since 1868 and 1874. All territory north of that line has been considered to be in Colorado and all territory south in New Mexico. The same rule obtains with respect to Government post offices and all other Government activities.

For more than 30 years subsequent to 1868 the position of the Darling line, from the Macomb monument to the intersection of the 37th parallel of north latitude with the 109th meridian of longitude west from Greenwich, remained undisputed and the correctness of its technical execution unquestioned, and, as so established and monumented, with the exception of the filing of this suit, the

said Darling line hitherto has been recognized and accepted by the United States, by the Territory and State of Colorado and by the Territory and State of New Mexico, and has been and is now recognized and accepted by the Land Department of the United States, in its surveys of the public domain, as the boundary line between Colorado and New Mexico from the Macomb monument westward. From 1868 to the present time the Territory and later the State of Colorado has claimed and exercised dominion and sovereignty and now claims the same, over the territory down to the boundary line so established by Darling and no further. County lines have been formed, towns and settlements have been established, school districts, election districts, voting precincts, land districts and water districts have been created with reference to said line. Public officials have been elected, property has been assessed and taxes levied and collected under the authority of the State of Colorado, and its courts, both civil and criminal, have exercised jurisdiction in all places north of said Darling line. The Territory and State of New Mexico has exercised like jurisdiction in all places south of said line (fols. 611-612, pp. 494-495).

Since 1874, the Major survey and marking of 37th parallel of north latitude from the southwest corner of Kansas westward to the Macomb monument has been the recognized and accepted south boundary of Colorado between said points and, since the acceptance of the Preston survey, retracement and remarking of said line, in the year 1901, the Major line as remarked and retraced by Preston between said Macomb monument and the Preston monument, at the intersection of said parallel with the Cimarron Meridian, has been and now is the recognized and accepted boundary between Colorado and New Mexico at all points between said monuments and

Colorado has exercised dominion and sovereignty north of said line and New Mexico south from said line (fol. 612, p. 495).

The Carpenter line lies to the north of the Darling line, with the exception of a few miles near the Macomb and Preston monuments where, in running from the west, Carpenter crossed the Darling line, passed a very short distance to the south of the Macomb and Preston monuments and, easterly from the Preston monument, recrossed the boundary between Colorado and Oklahoma (the Major line) and remained considerably north of the Major line across the remainder of Colorado, intersecting the east line of Kansas about one-half mile north of the long established and recognized southwest corner of that state. If the ~~Darling~~ line should be declared to be the boundary between Colorado and New Mexico, the Preston monument, now recognized as the northeast corner of New Mexico, will lie too far to the north and a new monument will have to be established at the northeast corner of New Mexico. This monument would also become the northwest corner of Oklahoma. The southeast corner of Colorado would be one-half mile northwest of the corner of Kansas, notwithstanding the fact that said corners are both presumed to be on the 37th parallel. A considerable strip of territory, including several towns and villages and a number of inhabitants, valuable properties, etc, would be taken away from Colorado and added to New Mexico. It would logically follow that upon complaint of Oklahoma, a similar strip of territory should be taken from Colorado and added to Oklahoma. If the Carpenter survey is to be adopted as the boundary between Colorado, New Mexico and Oklahoma, upon the theory that it is a more accurate fixation of the position of the 37th parallel, it would follow that the 37th parallel of north latitude between Kansas and Oklahoma is not correctly

located and should be resurveyed thereby taking a strip of territory from Kansas and adding the same to Oklahoma. To what extent this displacement of existing boundaries between other states located along the 37th parallel of north latitude would be affected the record does not show but it may well be presumed that irregularities would be found easterly and westerly across the United States.

New Mexico urges that the Court decree that the line surveyed and monumented by Carpenter is the boundary between Colorado and New Mexico.

Colorado maintains that the boundary between the two states is that established and monumented by Johnson, Macomb, Darling and Major in 1857, 1859, 1868 and 1873, respectively, and, by cross-bill, prays that the Court cause the Major-Darling line to be restored and remonumented while the traces of the said line are still capable of location, and in order that all future controversy may be at an end.

THE PLEADINGS.

October 29, 1919, New Mexico filed her bill of complaint alleging that on July 7, 1902, Howard B. Carpenter, a U. S. Surveyor, entered into a contract with the United States, to well, truly and faithfully resurvey, reestablish and remark the boundary between Colorado and the then Territories of New Mexico and Oklahoma, along the 37th parallel of north latitude lying between the 25th and 32nd degrees of longitude west from Washington and that in pursuance of said contract such resurvey, reestablishment and remarking was made by Carpenter in accordance with his field notes, a copy of which, with his instructions, is attached to the bill of complaint. New Mexico then claims that the Carpenter line is the boundary between

Colorado and New Mexico; that Colorado disregards said boundary and has usurped jurisdiction of a considerable amount of the territory south of the line, including the levy and collection of taxes, the exercise of civil and criminal jurisdiction by her courts, etc., and prays that the line surveyed, established and marked by Carpenter, as set forth in the field notes of his survey, be decreed to be the true boundary between the States of Colorado and New Mexico.

March 1, 1920, Colorado filed her answer and cross-bill and March 18, 1924, filed her amended answer and amended cross-bill.

In the original answer and cross-bill Colorado pleaded that the Darling line is and always has been the boundary between the Territories and later the States of Colorado and New Mexico. Before the conclusion of the taking of testimony it was discovered that the long established and accepted boundary between the two states also includes the two miles and 40.53 chains of the Major line lying between the Macomb monument and the Preston monument (at the intersection of the 37th parallel with the Cimarron Meridian). Colorado amended her answer and cross-bill to conform.

The Amended Answer by Colorado admits the Carpenter survey, but avers that his survey and field notes were never confirmed by Congress or by either Colorado or New Mexico, and that, on the contrary, the effort made to confirm said survey by Congress was vetoed by President Roosevelt and failed to become effective and the Carpenter line never has been recognized as the boundary. A copy of the veto message is attached to the original answer by Colorado and made a part thereof. Colorado denies that the Carpenter line is the boundary between

the states and admits that Colorado has disregarded the Carpenter line and has exercised and does exercise dominion over a considerable strip of territory south of the Carpenter line, has levied and collected taxes on properties and, through its courts, has exercised both civil and criminal jurisdiction over persons and property south of the Carpenter line. Colorado then pleads the admission of the State to the Union on August 1, 1876; the establishment of the Macomb monument in 1859 at the intersection of the 37th parallel with the 103rd Meridian of longitude west from Greenwich; the survey of the 37th parallel from the Macomb monument to the southwest corner of Colorado by Darling in 1868; the survey by Major, in 1874, of the south boundary of the Territory of Colorado between the 25th and 103rd Meridians of longitude west of Washington and Greenwich respectively, and the monumenting of said line from the southwest corner of Kansas to and beyond the Macomb monument; attaches to the original answer and the amended answer and cross-bill the field notes and contracts of both Darling and Major; alleges the retracing, remarking and reestablishing by Preston, in 1900, of the Major line from the Macomb monument easterly for a distance of two miles and 40.53 chains to its intersection with the Cimarron Meridian, where Preston erected his monument as and for the northeast corner of the then Territory of New Mexico; attaches a copy of Preston's record and field notes to the amended answer; avers that for more than 30 years the position of the Darling line remained undisputed and the correctness of its technical execution unquestioned and that the said line has been generally recognized and acquiesced in by both the states and accepted by the Federal Government and is now recognized and accepted by the Federal Government as the true and subsisting boundary line between Colorado

and New Mexico from the Macomb monument westward. Colorado then justifies her exercise of dominion and sovereignty north of the Darling line since 1868 and alleges those activities upon her part indicative of the exercise of sovereignty; avers that Government postoffices are established in Colorado and New Mexico with reference to said Darling line and that public land surveys in both states are closed thereon; pleads the Major survey in 1874, from the southwest corner of Kansas to the Macomb monument and avers that the Major line, together with the retracement and remarking thereof by Preston between the Macomb monument and the Cimarron Meridian has been and now is a part of the boundary between Colorado and New Mexico; avers that the Carpenter line passes through several towns in Colorado and that along the entire line there are material and excessive variances between the Carpenter line and the true boundary between the states (the Darling-Major surveys); that the Carpenter line passes 93 links south of the Macomb monument and 110 links south of the Preston monument and that the establishment of the line as the boundary would remove a considerable strip of territory from Colorado and place the same in New Mexico to a point some distance westerly from the Macomb monument (where the Carpenter and Darling lines cross) and that from this point easterly it would remove a narrow strip of territory from New Mexico and add the same to Colorado. Avers that the Carpenter survey consisted of a new fixation of the 37th parallel of latitude independent of the Darling-Major line and that the Carpenter line not only failed of confirmation by Congress but has been ignored by the Federal Government, which has accepted and still accepts the Darling-and Major surveys as the true and correct boundary between the States. Colorado then prays that complainant's prayer be denied and that the Darling-

Major line be declared to be the true boundary between the States.

By amended cross-bill Colorado alleges that the true boundary line between the litigant States is the line surveyed and monumented by Darling in 1868, field notes of which are attached to the original answer, from the Macomb monument to the southwest corner of Colorado and the line surveyed and monumented by Major in 1874 and retraced and reestablished by Preston in 1900 from the Macomb monument easterly to the Preston monument (the northeast corner of New Mexico); adopts by reference the allegations of fact contained in the Amended Answer and avers that Carpenter in making his survey destroyed and obliterated many of the monuments and corners established by Darling. Colorado prays that, for the purpose of avoiding future controversy, the Court declare and decree the Darling and Major line to be the boundary between the States and prays such relief as may be necessary in order to restore, reestablish and remark said boundary.

THE EVIDENCE.

THE EVIDENCE SHOWS THAT FROM THE MAKING OF THE DARLING SURVEY IN 1868 THAT SURVEY WAS ACCEPTED AND RECOGNIZED AS THE BOUNDARY BETWEEN COLORADO AND NEW MEXICO, AND HAD FOR MORE THAN FIFTY YEARS MET WITH GENERAL ACQUIESCENCE AS SUCH BOUNDARY LINE.

WALTER T. PAYNE, a witness for Colorado, testified:

That he had been Assistant Chief of Surveying Division of the General Land Office for 25 years, and had been employed in the General Land Office for 31 years.

That to the best of his knowledge and belief all public surveys in Colorado and New Mexico have been closed on the Darling line (Record, p. 509).

That the Darling line was recognized by the General Land Office as the southern boundary of Colorado in 1876, when Colorado was admitted to the Union, and as the northern boundary of New Mexico January 6, 1912, when New Mexico was admitted; that it is so recognized today.

It is his impression and belief that all lands surveyed and patented along the 37th parallel north latitude between the 103rd and 109th meridians have been closed along the Darling line (p. 509).

That the Darling line was recognized as the boundary before either Colorado or New Mexico became a State.

That there was a time when the Land Office recognized the Carpenter survey as the true north boundary of T. 32 N., R. 4 W., N. M. P. M., but that in the survey of all other townships on or near the boundary, the Darling line has been recognized as the true boundary since 1869 (pp. 515-516).

(NOTE: This exception refers to a survey of said township 32 made by Alonzo E. Compton in 1907. See plaintiff's Exhibit 19, opposite p. 826; also Compton's testimony, pp. 618, 619.)

SIMON E. SULLIVAN, a witness for Colorado, testified:

Has been in the Post Office Department, in various positions, since 1893 and is now Assistant Superintendent, Division of Postmasters' Appointments (p. 517).

That the Post Office records show that the post office of Edith, established in 1895, is in Colorado; that from

1891 to 1901 the post office of Arboles was in Colorado and from 1900 to 1908 the post office of Osier was in Colorado; that in 1908 a post office was established at Wooton in Colorado, and that the post office of La Boca is in Colorado (pp. 517-520).

This testimony is borne out by Colorado's Exhibit No. 19, "Post Route Map of the State of Colorado, showing post offices with the intermediate distances on mail routes in operation on the first of January, 1922, published by order of Postmaster General Will H. Hayes", found immediately preceding record, p. 537.

ARTHUR KIDDER, a witness for New Mexico, testified:

Assisted in locating the eight astronomical monuments of the Carpenter survey. Organized a surveying party to retrace Carpenter's line from ast. mon. No. 5 to ast. mon. No. 6, in 1903 (p. 542). He does not regard the Carpenter line as the precise parallel (p. 543).

Believes the Darling line the only one now recognized by the United States General Land Office as the boundary (p. 547).

He thinks the maximum adjustment at any point in the Carpenter line would not exceed six chains, or about 400 feet (pp. 548-549).

That between the 103rd and 109th meridians the elevation varies from 4000′ to 12000′ (p. 560).

FRANK M. JOHNSON, a witness for New Mexico, testified:

He has been U. S. Supervisor of Surveys since 1910 (p. 561).

In 1899 he examined the east boundary of the southern Ute Indian Reservation. Could not locate the Darling

line between the Navajo River and a point east of Edith (about 15 miles), but he was able to determine the general position of the Darling line from the original field notes.

In 1900, under instructions of the Commissioner of the General Land Office, he made a further examination of the southern boundary of Colorado for the purpose of finding and identifying the Darling line between Darling's 6th and 8th ast. mons.; in other words, between Darling's 182nd and 241st mile corners—a distance of 60 miles (pp. 563, 564).

(NOTE: Johnson's recommendation attached to his field notes of his survey of the Darling line between ast. mons. 6 and 8, is that ast. mon. No. 7 be restored to its original position at Edith, and monuments set by proportionate measurement on a line joining this monument and the 206th mile corner (p. 667.)

In 1917, a question arose as to which line public land surveys should close upon, and Johnson took up the matter with the Commissioner of the General Land Office and was instructed to reestablish the Darling line in the vicinity of Edith (Darling's 7th ast. mon.). Johnson then instructed William C. Perkins, U. S. Surveyor, to reestablish the Darling line from Ranges 1 to 4 West, N. M. P. M., and East from Range 1 to Ewell Canyon; also from the Darling 206th mile corner West to Ewell Canyon, and to connect the ends of these two lines by an oblique line, the two lines having a difference in altitude of about 30 chains.

All public surveys on the 37th parallel between the 103rd and 109th meridians are now closed on the Darling line. In R. 4 W., N. M. P. M., they at one time closed on the Carpenter line, but it is Johnson's recollection that these were later changed to close on the Darling line.

The General Land Office, for administrative purposes, recognizes only the Darling line and has done so at all times since 1868, except as to R. 4 W., just mentioned (pp. 571-572).

Johnson thinks that it is true that political subdivisions such as counties, school districts, etc., in New Mexico, and Colorado, for 53 years have closed on the Darling line. Changing from the Darling to the Carpenter line would to some extent require changes of all public surveys in the United States Land Office along the boundary (p. 574).

From the Navajo River west the difference between the Darling and the Carpenter lines is not greater than 10 chains (p. 575).

Johnson is of the opinion that portions of the Darling line not already restored can be restored (p. 575).

As a result of his investigations, in 1899, 1900, and 1901, Johnson "suggested * * * the feasibility and desirability of restoring the Darling line between astronomical stations 6 and 8—the only part of the line at that time in question" (p. 579). This has since been done for over 30 miles in the vicinity of Edith (p. 579).

The Darling line was accepted by the Commissioner of the General Land Office as the northern boundary of New Mexico (p. 580).

In the survey of boundaries by the United States between territories of the United States, the Commissioner of the General Land Office is the usual and customary authority for accepting the surveys (p. 581).

Johnson in his work has found state boundary lines defective. Modern methods of determining azimuth and measurements are far more accurate than those of an early day (p. 585).

GUY P. HARRINGTON, a witness for New Mexico, testified:

Is Assistant Supervisor of Surveys, General Land Office.

That some surveys in this vicinity do not close on any line; that Colorado patents have issued for lands that have extended below the Darling line.

In T. 32 N., R. 4 W., are four patents which extend to the Carpenter line.

Instructions from U. S. Land Office have always been to close on the Darling line, except in two townships, so far as he knows (p. 601).

It is no doubt the intent of the Commissioner that all surveys be closed on the Darling line. All of us understand that the Darling line is recognized by the Land Office; that is the line "we" recognize in our work as the state line (p. 603).

The instructions from the General Land Office, dated July 2, 1918, to Group 79, which included T. 32 N., R. 1 and 4 W., and 1 E. in New Mexico, called for closing upon the reestablished Darling line (p. 606).

The Darling line was recognized by the Land Office in 1902 as it is now, and was so shown on government records as the only boundary line between Colorado and New Mexico. The Land Office has, since 1869, recognized the Darling line, except for a brief time when two townships were ordered to be closed against the Carpenter line (p. 607).

ALONZO E. COMPTON, a witness for New Mexico, testified:

Was formerly Assistant Supervisor of Surveys and held that office a little over 9 years. Prior to becoming

Assistant Supervisor of Surveys, had been connected with the Land Department of the Government for six or seven years; is a graduate Civil Engineer (pp. 617, 618).

Under contract 408, dated June 20, 1907, he surveyed T. 32 N., R. 7 E., and 4 W.; closed on Carpenter line "by direction of the authorities" (p. 618).

He believes T. 32 N., R. 4 W., was re-surveyed "either to make new closings or to determine the status of certain homesteads"; that he "knows of no change in R. 7 E.; knows of no other townships closing on the Carpenter line" (p. 619).

(NOTE: Witness Compton says that the New Mexico principal meridian jogs one mile west from Ewell Canyon.)

Scores, and perhaps hundreds, of patents to lands along the boundary have issued and all close on the Darling line with perhaps two or three exceptions (p. 627).

The General Land Office recognizes only the Darling line (p. 630).

The stipulation between the parties (pp. 493-496) leaves no doubt that the Darling line from the Macomb Monument westward to the southwest corner of Colorado, has, since 1869, been recognized as the boundary by the Land Department of the United States, by Colorado and by New Mexico until the bringing of this suit in October, 1919.

It is to be noted that New Mexico pleaded the Carpenter line from the northwest corner of New Mexico eastward to the Preston Monument on the Cimarron Meridian, which is two miles and 40.53 chains east of the Macomb Monument, which latter marks the eastern end of the Darling survey. The boundary as claimed by Colo-

rado between the Macomb Monument and the Preston Monument, is a part of the Major survey of 1874 as resurveyed by Preston in 1900. (Paragraph (b), p. 494; Major and Preston field notes, pp. 487-492.)

This small piece of the boundary between the two States, has been accepted and recognized to the same extent as has been the Darling line (Stipulation, pp. 493-496).

The evidence in the case is directed mainly to the fact of the making of the respective surveys involved, the official character thereof and to the extent of their recognition by the United States and the States concerned. The fact that Colorado at all times exercised dominion and sovereignty in all places north of the Darling-Major line is fully conceded by New Mexico in the stipulation above referred to.

We quote the language of that stipulation at page 495 of the record:

> "That from 1868 to the present time the Territory and later the State of Colorado, defendant herein, has claimed and exercised dominion and sovereignty, and now claims the same, over the territory down to the boundary as established by said Darling and no farther; that county lines have been formed, towns and settlements have grown up, school districts, election districts, voting precincts, and land districts and water districts have been created with reference to said line; public officers have been elected, property has been assessed and taxes levied and collected under the authority of the Territory and State of Colorado, and its courts of both civil and criminal jurisdiction have exercised jurisdiction in all places north of said Darling

line and the Territory and State of New Mexico has exercised like jurisdiction in all places south of said line; that government post offices have been established as being in Colorado when north of said line and as in New Mexico when south of said line, and that public land surveys on both sides of said line have been closed thereon, lands have been disposed of, rights acquired and political boundaries in both Colorado and New Mexico have been fixed by reference to said line."

ACCURACY OF THE TWO SURVEYS.

Counsel for complainant lays great stress upon what he terms the accuracy of the Carpenter line and the inaccuracy of the Darling line.

Complainant's attack upon the Darling survey is confined to a small part thereof lying between Darling's 6th and 7th Astronomical Monuments. In fact, the only inaccuracy of any consequence which has been shown to exist in the Darling survey, is between the 196 mile corner and Ewell Canyon, a distance of about 16 miles.

Colorado contends that this is not a matter for consideration at this late date, but it may be well to point out that it has been fully established that the Carpenter line is far from perfect as a location of the 37th Parallel North Latitude. Complainant's witness Johnson testified that he made tests between Carpenter's astronomical monuments 4 and 6 and found that Carpenter's astronomical monument No. 5 is 14 chains too far North (pp. 582-583). This deviation is nearly one-half as great as the jog in the Darling line at Ewell Canyon. And complainant's witness Compton testified "the alignment of the Darling survey so far as I have observed it, except the jog at Ewell Canyon, is good and that of the Carpenter survey

is perhaps excellent" (p. 625). And Compton further stated that measurements of the Carpenter survey are not as good as should have been accepted (p. 625).

Complainant's counsel, near the end of page 2 of his brief, calls attention to the fact that the Carpenter line is 3 miles and 11 chains longer than the Darling line, as evidence of the inaccuracy of the Darling line. Counsel has evidently forgotten that Carpenter, running his line from west to east, passed the Macomb Monument, which was the initial point of the Darling survey, and stopped at the Cimarron Meredian near the Preston Monument, which is two miles and 40.53 chains east of the Macomb Monument (see Carpenter field notes, following his 333rd and 335th miles, pp. 292 and 294). This accounts for all of the discrepancy in the length of the two lines except 50.47 chains, or about five-eigths of a mile. Considering that these lines were run over a country mostly mountainous, this difference in length is not remarkable.

Counsel for complainant seems to think that because of the break in the Darling line at Ewell Canyon, that line despite its long recognition must give way to the Carpenter line. But counsel is in error. A break or jog in a boundary line which has been established and accepted is not ground for discarding it. In Colorado's Exhibit No. 18, a letter from the Commissioner of July 6, 1918, to the United States Surveyor General of New Mexico, giving a history of the Darling and Carpenter lines and accepting the Perkins' resurvey, the Commissioner says (pp. 525 on 528):

> "Defects in the original survey discovered after a long term of years, do not affect the validity of the establishment. It may be cited that the boundary between South Dakota and Montana is fourteen chains west of the boundary between South Dakota and Wyoming, although both are declared

to be the same meridian of longitude, namely, twenty-seven degrees west of Washington. As (fol. 687) another instance of defective original establishment of a State boundary may be mentioned the boundary between Wyoming and Montana in the vicinity of T. 58 N., R. 101 W., 6th P. M., Wyoming. This boundary although declared to be on the 45th parallel of latitude contains a break in the line at mile post No. 97. The line between mile posts 97 and 98 according to the records of this office was found to be S. 66 degrees E., 87.37 chains, which corresponds to a difference of about 35 chains in the latitudinal position. The marked similarity between this case and the one in hand will be noted. There is of course no intention of making any change in these boundaries. When it is understood that an error of one second of arc of latitude is equivalent to an error of about 100 feet measured upon the earth's surface, no two independent establishments of a parallel of latitude can be in exact agreement. The well established principle of law that monuments control over courses and distances is quite applicable to this case."

The Darling line was thoroughly marked at the time of his survey, is still in existence and can be retraced and remarked wherever necessary without great difficulty.

Complainant's witness Johnson stated that from Darling's astronomical monument No. 6 West to his 196 mile corner (about 14 miles) he found the line by Darling's notes and the signs then in existence (p. 585); and that he identified Darling's 201, 202, 203 and 206 mile corners (p. 586). Complainant's witness Compton says that temporary corners were set by Darling from his 191 mile corner to his astronomical monument No. 7, which is

near his 214 mile corner and west of Ewell Canyon and "that he perhaps monumented his line all the way through as he went on his temporary line * * *." (P. 623.) Compton further says: "No doubt those points he marked temporary points from the 191 mile up to Ewell Canyon were actually monumented by him and were never changed" (p. 624). Compton also testified that at the time he made his examination in 1907, it was possible to reestablish and relocate the Darling line except one little gap near Ewell Canyon and that Carpenter did not destroy all Darling's corners, notwithstanding his official field notes (pp. 629, 630). And in his report to Frank M. Johnson of November 20, 1916, on his survey of T. 32 N., Compton says that the instructions for this survey contemplated restoring locally the Darling line (p. 707) and that "it is quite certain that the Darling line can be relocated on the ground very closely * * * there is 6 to 8 astronomical monuments" (p. 709).

That part of the Darling line between his astronomical monuments 6 and 8, concerning the location of which some doubt at one time existed, was completely restored and remonumented by William C. Perkins, U. S. Surveyor in 1917, and the monuments established by him should be considered by Commissioners to be appointed by this Court to restore and remonument the boundary between the States.

STATEMENT OF THE ARGUMENT.

I.

The Darling-Major line was established by the United States when both Colorado and New Mexico were territories and both states are bound by that boundary line.

II.

The surveys of the Darling-Major line made in 1868 and 1874 are the senior surveys of the boundary line and must prevail over the junior survey made by Carpenter in 1902.

III.

The Darling-Major line is the boundary between these states by reason of the recognition and acceptance thereof by the territories and later by the States of Colorado and New Mexico and by the United States from the time of the survey thereof until the time this suit was filed.

IV.

The Carpenter survey has no legal status as a boundary line because it was made without the consent of the State of Colorado, never received the approval of the state, was rejected by Congress and has always been disregarded by every department of the government of the United States.

V.

The Darling-Major line is the legal boundary between the two states and the Court should appoint commissioners to restore the Darling monuments unlawfully destroyed by Carpenter and to reestablish and remonument the boundary.

ARGUMENT.

I.

The Darling-Major line was established by the United States when both Colorado and New Mexico were territories and both states are bound by that boundary line.

The Darling-Major line was the boundary at the time Colorado was admitted into the Union as a State in 1876. No other line was claimed by any of the interested parties. The Carpenter survey was not made until twenty-six years afterwards (1902).

New Mexico was admitted into the Union as a State January 5, 1912, and at that time its northern boundary was the Darling-Major line, so when both states were admitted into the Union the Darling-Major line, constituted the boundary between them. Colorado is now and has been for many years prior to the commencement of this suit in the actual and exclusive possession of, and exercising dominion and sovereignty over the territory involved herein, to the Darling-Major line.

At the time Colorado was admitted into the Union as a State, and also at the time of the admission of New Mexico as a State, the United States were committed to the Darling-Major line as the boundary between said states, and the State of New Mexico is bound by such recognition and adoption, and it must abide by the condition of its predecessor, and is estopped, and cannot now be heard to disavow the Darling-Major line as its true northern boundary.

The well-settled rule is that the boundaries of a state must be determined by what they were at the time of its admission into the Union. A newly formed state is bound by the acts of its predecessor, the Government of the

United States, in regard to matters of boundary, which had plenary jurisdiction over the subject as long as the state remained a territory.

Missouri v. Iowa, 7 How. 660.
Missouri v. Kentucky, 11 Wall. 395.
Indiana v. Kentucky, 136 U. S. 479.

In Missouri v. Iowa, 7 How. 660, 668, this Court said:

"The new state of Iowa came into the Union December 27, 1847, and up to this date she was bound by the acts of her predecessor, the United States, forasmuch as the latter might have directly conceded to Missouri a new boundary on the north, as was done on the west; and so likewise, Iowa is bound by the acts and admissions of the United States, tending indirectly to confirm and establish a particular line as the northern boundary of Missouri. * * *

"The country north of the State of Missouri was for a time attached to the Territory of Michigan, and then to the Territory of Wisconsin. By the act of June 12, 1838 (Ch. 96), it was formed into a separate territorial government by the name of Iowa. And by another act of the same date (Ch. 100), the territory was formed into two land districts, the southern one embracing the country in dispute.

"And on the Iowa side, the public surveys were executed, and lands were sold up to Sullivan's northern line. Nor had the Surveyor General of Illinois and Missouri any jurisdiction to go beyond it north; nor the surveyor's department of Iowa, to cross it by surveys to the south. From the time that Missouri became a state to this day, Sullivan's line has

been recognized by the United States as the true northern boundary of Missouri, so far as it could be done through the department of public lands.

"And thirdly, Congress, as early as 1834, organized a territorial government bounded by said line; laid off counties bounded by it on the south, as early as 1836; and governed the territory for ten years up to that time—all the time recognizing it as the proper northern boundary of Missouri.

"From these facts it is too manifest for argument to make it more so, that the United States were committed to this line when Iowa came into the Union. And, as already stated, Iowa must abide by the condition of her predecessor, and cannot now be heard to disavow the old Indian Line as her true southern boundary. * * *

"We are, therefore, of opinion that the northern boundary of Missouri is the Osage Line, as run by Sullivan in 1816 from the northwest corner, made by him, to the Des Moines River; and that a line extended due west from said northwest corner to the Missouri River, is the proper northern boundary on that end of the line. And this is the unanimous opinion of all the judges."

And the following language is quoted from the decree:

"And the Court further finds, that the State of Iowa is estopped from setting up claim to a line south of the old Indian boundary, known as Sullivan's line, as said State, by her cross-bill, assumed to do; because her predecessor, the United States, by many acts, and by uniform assumptions, up to the time when Iowa was created, in December, 1846, recognized and adopted Sullivan's line as the proper

> northern boundary of the State of Missouri; and that the State of Iowa is bound by such recognition and adoption."

The Darling-Major line was surveyed when the United States was the owner of the public domain which then comprised both the territory of Colorado and the territory of New Mexico. At that time the United States was vested with full and complete power to establish the boundary line between Colorado territory and New Mexico territory where and as it pleased. The location of that line was an establishment of the boundary by the United States as the common owner of both territories. The surveys were, in legal effect, a practical location of the boundary line made by the owner of the territory on each side thereof, which said owner thereafter became the common grantor of Colorado and New Mexico. This boundary line was not only established by the survey, but it was actually marked upon the ground by proper monuments. The rule of law applicable in such case is concisely stated by a text writer in 9 Corpus Juris, p. 244, as follows:

> "A practical location made by the common grantor of the division line between the tracts granted is binding on the grantees. The line established in that manner is presumably the line mentioned in the deed, and no lapse of time is necessary to establish such location, which does not rest on acquiescence in an erroneous boundary, but on the fact that the true location was made, and the conveyance in reference to it."

The legal theory of the doctrine known in law as a practical location of a boundary line is stated in *Alt v. Batz*, 81 N. J. L. 156, 158, as follows:

"In legal theory the doctrine of a practical location is equitable in its nature, arising from the principle of estoppel *in pais*, the fundamental conception of which is the doing of an act by a party in interest, or his acquiescence in the doing of an act by another which would naturally lead to the inference of the existence of a *status* or the establishment of a condition upon which either party in interest may act to his prejudice if the act be disavowed. It is used to preclude a party from maintaining by evidence that which he had before expressly or tacitly denied; or disproving that which he had before expressly or tacitly admitted, when the other party has acted upon the faith of the admission or denial in such a manner that he will be injured unless the same is held conclusive. *Shapley v. Abbott*, 42 N. Y. 443."

Therefore, since the Darling and Major surveys had established the southern boundary of Colorado by marking the same with proper monuments upon the ground, the call for the 37th parallel subsequently made in the Enabling Act, under which Colorado was admitted as a state is controlled by said monuments, regardless of whether said monuments are actually located on said 37th parallel or not. In other words, since the United States established the southern boundary of Colorado by said surveys and actually marked this boundary upon the ground by proper monuments, the correctness of the survey may not thereafter be questioned by any party holding under the United States as grantor. The fact that it may have been the intention to have these surveys follow with perfect exactness the imaginary astronomical line known as the 37th parallel is in no sense controlling after the same were completed and approved. When public land has been

surveyed by authority of the United States, and property rights have been acquired with reference to such survey, the corners and lines so established, whether correct or not, are conclusive and cannot be altered or controlled by other surveys.

Billingsley v. Bates, 30 Ala. 376.
Climer v. Wallace, 28 Mo. 556.
Mayor etc. of Liberty v. Burns, 114 Mo. 426.
Granby Min. etc. Co. v. Davis, 156 Mo. 422.
Arneson v. Spawn, 2 S. Dak. 269.
Goodman v. Myrick, 5 Or. 65.
Jones v. Kimble, 19 Wis. 429.

The question at issue in the instant case is governed by the same legal principles and rules of law that would control if the parties litigant were private parties contending over a boundary line dividing their private estates. But as to private parties, the Darling Major survey would be absolutely conclusive. A few of the many authorities uniformly so holding are referred to in the following note to the case of *Washington Real Co. v. Young*, 110 A. S. R. 678:

> "On the sale of land in sections or subdivisions thereof, according to the government survey, the survey as actually made and run on the ground governs, if the monuments, corners, or lines actually established can be located or proved. (Citing cases.) The true corner of a governmental subdivision of land is where the United States surveys in fact establish it, whether such location is right or wrong, as may be shown by a subsequent survey. (Citing cases.) The question is not where the government corner should have been located, but where in fact it was located. And when it is once found, or the place of its location identified, it must control. * * *

"'The boundaries, as established by the government surveyors and returned to and accepted by the government, are unchangeable, and control the description of the lands patented. And it is well settled that mistakes in the surveys cannot be corrected by the judicial department of the government.' Chap v. Brandt, 45 Minn. 93, 47 N. W. 461. 'That the power to make and correct surveys of the public lands belongs to the political department of the government and that while the lands are subject to the supervision of the general land office, the decisions of that bureau in all such cases, like that of other special tribunals upon matters within their exclusive jurisdiction, are unassailable by the courts, except by a direct proceeding; and that the latter have no concurrent or original power to make similar corrections, if not an elementary principle of our land law, is settled by such a mass of decisions of this court that its mere statement is sufficient. The reason of this rule is that great confusion and litigation would ensue if the judicial tribunals were permitted to interfere and overthrow the public surveys on no other ground than an opinion that they could have the work in the field better done and divisions more equitably made than the department of the public lands could do'; Cragin v. Powell, 128 U. S. 691."

II.

The surveys of the Darling-Major line made in 1868 and 1874 are the senior surveys of the boundary line and must prevail over the junior survey made by Carpenter in 1902.

The real question now for this Court to determine is not which of the two lines is correct, but where the boundary line was originally located, since it is utterly immaterial which of the two lines represents the correct delimitation of the astronomical parallel.

The Darling-Major line represents the senior surveys and must control over the recent Carpenter survey.

The Carpenter survey should not prevail because:

1. It is not shown to have been made by proper authority.

> "It is the acts done on the ground by the surveyor in pursuance of lawful authority which constitutes the survey."
>
> 5 Cyc. p. 949.
>
> "A survey is not usually admissible in evidence as showing the location of boundaries if it does not appear that it was made by proper authority."
>
> 4 R. C. L., Sec. 54, p. 116.

2. It was simply a new and independent survey, and does not purport to show the line as originally established.

> "Original corners, as established by the government surveyors, if they can be found, or the places where they were originally established, if they can be definitely determined, are conclusive,

without regard to whether they were located correctly or not."

5 Cyc. 873.

Washington Rock Co. v. Young, 29 Utah 108:

"The law is well settled that an original survey of lands, upon the faith of which property rights have been based and acquired, controls over surveys subsequently made which injuriously affects such rights."

29 Utah 108, 118.

In Clement v. Parker, 125 U. S. 309, 332, it was said:

"It is unquestionably true that a junior survey cannot control or enlarge the dimensions of a senior survey. We understand this to mean, that when the location of a survey is or can be ascertained and determined by its own marks upon the ground, its own calls and courses and distances, it cannot be changed or controlled or enlarged or diminished by the marks or lines of an adjoining junior survey; but when, from the disappearance of these original landmarks, caused by time and other agencies, from the senior survey, the location of a particular line, or the identity of a corner, is left in uncertainty or becomes the subject of controversy, then the original and well established marks found upon a later survey made by the same surveyor about the same time, and adjoining the one in dispute, are regarded as legitimate evidence, not to contest or control, but to elucidate, throw light upon, and thus aid the jury in discovering the exact location of the older survey."

1 Dembitz on Land Titles, Sec. 4.

5 Cyc. 874, 875.

4 Am. & Eng. Enc. of Law, 787.
Goodman v. Myrick, 5 Ore. 65.
Payne v. English, 79 Calif. 540.
Irvin v. Rotramel, 68 Ill. 11.
Clement v. Northumberland Coal Co., 87 Pa. St. 291.
Hubbard v. Dusy, 80 Calif. 281, 22 Pac. 214.
Nesselrode v. Parish, 59 Iowa 570, 13 N. W. 746.
Billingsley v. Bates, 30 Ala. 376, 66 Am. Dec. 126.

A subsequent survey cannot alter or control an original survey. Where it can be traced or proved it must govern.

In Diehl v. Zanger, 39 Mich. 601, 605, where the first survey of lots involved in litigation was made by one Campau, a resurvey, made after the disappearance of the monuments of the original survey, was for the purpose of determining where they were, and not where they should have been. In delivering the opinion Mr. Justice Cooley said:

> "Nothing is better understood than that few of our early plats will stand the test of a careful and accurate survey without disclosing errors. This is as true of the government surveys as of any others, and if all the lines were now subject to correction on new surveys, the confusion of lines and titles that would follow would cause consternation in many communities. Indeed, the mischiefs that must follow would be simply incalculable, and the visitation of the surveyor might well be set down as a great public calamity. But no law can sanction this course. The surveyor has mistaken entirely the point to which his attention should have been di-

rected. The question is not how an entirely accurate survey would locate these lots, but how the original stakes located them. * * * The city surveyor should, therefore, have directed his attention to the ascertainment of the actual location of the original landmarks set by Mr. Campau, and if those were discovered they must govern. If they are no longer discoverable, the question is where they were located."

In the City of Racine v. Emerson, 85 Wis. 80, 86, Mr. Justice Orton said:

"The fact, generally known and quite apparent in the records of courts, is that two consecutive surveys by different surveyors seldom, if ever, agree; and the greater number of surveys, the greater number of differences and disagreements will occur. When two surveys disagree, the correct one cannot be determined by still another survey. It follows that resurveys are of very little use in such a case as this, except to confuse it."

"In resurveying a tract of land according to a former plat or survey, the surveyors only function or right is to relocate upon the best evidence obtainable, the corners and lines at the same places where originally located by the first surveyor on the ground. Any departure from such purpose and effort is unprofessional, and so far as any effect is claimed for it, unlawful."

Pereles v. Gross, 126 Wis. 122.

3. The original Darling-Major line had been established by proper authority more than thirty years, and was the true and subsisting boundary line when the Carpenter survey was made.

4. The Carpenter survey was never accepted, nor confirmed by Congress nor by either of the States or Territories involved.

5. The Carpenter survey not only changes the boundary line between Colorado and New Mexico, but would require a change in the S. W. corner of Kansas and the N. W. corner of Oklahoma. The Carpenter line is one half mile north of the S. W. corner of Kansas.

6. The adoption of the Carpenter survey would injuriously affect public and private rights based upon the original line established by Darling and Major.

7. Carpenter was a trespasser upon territory over which Colorado then had dominion and exercised sovereignty, his survey was made without the consent of the State of Colorado, and his obliteration and destruction of corners and monuments of the boundary line then in existence and which had been established more than thirty years prior to his survey, was illegal and unauthorized.

8. New Mexico is bound by the action of Congress in refusing to confirm or accept the Carpenter survey.

III.

The Darling-Major line is the boundary between these states by reason of the recognition and acceptance thereof by the territories and later by the States of Colorado and New Mexico, and by the United States from the time of the survey thereof until the time this suit was filed.

The 37th parallel of north latitude, where it formed the boundary line between the Territories of New Mexico and Colorado, was surveyed, established and marked upon the earth's surface by the most approved methods of the

times (and evidenced by mile corners and monuments), by E. N. Darling, United States Surveyor and Astronomer, in the year 1868 and by John J. Major, United States Surveyor and Astronomer, in the year 1874. These surveys were examined and approved by the Commissioner of the General Land Office and were thereafter officially recognized by the United States as the delineation of the 37th parallel of north latitude in that vicinity and as the boundary.

For more than 30 years the position of the Darling-Major line remained undisputed and the correctness of its technical execution unquestioned. As so established and monumented, the Darling-Major line was recognized, accepted and acquiesced in by Colorado, New Mexico and the United States and is now recognized as the true boundary between Colorado and New Mexico by the State of Colorado and by the United States. Colorado has held rightful and lawful possession of and exercised dominion and sovereignty (and now claims the same) over the territory down to the Darling-Major line since the establishment thereof.

New Mexico is not only bound by the acts of the United States in surveying, establishing, monumenting and thereafter recognizing and adopting the Darling-Major line as the true boundary but is also estopped by the doctrines of long possession, prescription, laches and acquiescence from now asserting a different boundary.

Rhode Island v. Massachusetts, 4 How. 591;
Indiana v. Kentucky, 136 U. S. 479;
Virginia v. Tennessee, 148 U. S. 503;
Louisiana v. Mississippi, 202 U. S. 1;
Maryland v. West Virginia, 217 U. S. 1.

In Rhode Island v. Massachusetts, 4 Howard 591, decided in 1846, it was alleged by Rhode Island that there was a mistake in the location of the boundary line between said states. The bill was dismissed. The Court said:

> "More than two centuries have passed since Massachusetts claimed and took possession of the territory up to the line established by Woodward and Saffrey. This possession has ever since been steadily maintained, under an assertion of right. It would be difficult to disturb a claim thus sanctioned by time, however unfounded it might have been in its origin. * * * Surely this, connected with the lapse of time, must remove all doubt as to the right of the respondent under the agreements of 1711 and 1718. No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time, and fall with the lives of individuals. For the security of rights, whether of states or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be involved with greater justice and propriety than in a case of disputed boundary."

In Indiana v. Kentucky, 136 U. S. 479, the territory in dispute was an island in the Ohio river, over which Kentucky had long exercised dominion and sovereignty. In its opinion this Court said:

> "This long acquiescence in the exercise by Kentucky of dominion and jurisdiction over the island is more potential than the recollections of all the wit-

nesses produced on either side. Such acquiescence in the assertion of authority by the State of Kentucky, such omission to take any steps to assert her present claim by the State of Indiana, can only be regarded as a recognition of the right of Kentucky too plain to be overcome, except by the clearest and most unquestioned proof. It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority."

The Court also referred to the case of Rhode Island v. Massachusetts and quoted therefrom with approval that part of the opinion relative to the long possession of Massachusetts and the delays in alleging any mistake in the action of the colonies, which we have hereinbefore set forth.

The Court adds:

"Vattel in his Law of Nations, speaking on the same subject, says:

'The tranquility of the people, the safety of States, the happiness of the human race do not allow that the possessions, empire and other rights of nations, should remain uncertain, subject to dispute and ever ready to occasion bloody wars. Between nations, therefore, it becomes necessary to admit prescription founded on length of time as a valid and incontestable title.' Book II, c. 11, Sec. 149. And Wheaton in his International Law, says: 'T writers on natural law have questioned how far that peculiar species of presumption arising from the lapse of time, which is called prescription, is justly applicable as between nation and nation;

but the constant and approved practice of nations shows that by whatever name it be called, the uninterrupted possession of territory or other property for a certain length of time by one State excludes the claim of every other in the same manner as, by the law of nature and the municipal code of every civilized nation, a similar possession by an individual excludes the claim of every other person to the article of property in question. Part. II, c. IV. Sec. 164.' * * * 'The long acquiescence of Indiana in the claim of Kentucky, the rights of property of private parties which have grown up under grants from that State, the general understanding of the people of both States in the neighborhood, forbid at this day, after a lapse of nearly a hundred years since the admission of Kentucky into the Union, any disturbance of that State in her possession of the island and jurisdiction over it'."

Virginia v. Tennessee, 148 U. S. 503, approved the doctrine announced in the foregoing cases.

It was claimed by Virginia that by the charters of the English sovereigns, under which the colonies of Virginia and North Carolina were formed, the boundary line between them was intended and declared to be a line running due west from a point on the Atlantic Ocean on the parallel of latitude thirty-six degrees and thirty minutes north; that the State of Tennessee, having been created out of the territory formerly constituting a part of North Carolina, the same boundary line continued between her and Virginia, and also that the boundary line claimed by Tennessee does not follow this parallel of latitude but varies from it by running too far North, so as to unjustly include a strip of land about one hundred and thirteen miles in length, and varying from two to eight miles in

width, over which she asserts and unlawfully exercises sovereign jurisdiction.

Tennessee contended that the boundary line, as declared in the English Charters, between the colonies of Virginia and North Carolina was run and established by commissioners appointed by Virginia and Tennessee after they became States of the Union, by Virginia in 1800 and by Tennessee in 1801; that the line they established was subsequently approved in 1803 by the legislative action of both States, and has been recognized and acted upon as the true and real boundary between them ever since until the suit was filed—a period of more than 85 years. Tennessee further contended that the line thus established and acted upon was not open to attack as to its correctness, but must be held to be the true boundary line between the States, even though some deviations from the line of the parallel of latitude thirty-six degrees and thirty minutes north may have been made by the commissioners in the measurement and demarcation of the line. The decision was adverse to Virginia. The Court held:

> "A boundary line between States or Provinces as between private persons, which has been run out, located and marked upon the earth, and afterwards recognized and acquiesced in by the parties, for a long course of years, is conclusive, even if it be ascertained that it varies somewhat from the courses given in the original grant, and the line so established takes effect, not as an alienation of territory, but as a definition of the true and ancient boundary. Lord Hardwicke, in Penn. v. Lord Baltimore, 1 Vesey Sen. 444, 448; Boyd v. Graves, 4 Wheat. 513; Rhode Island v. Massachusetts, 12 Pet. 657, 734; United States v. Stone, 2 Wall. 525, 537;

Kellogg v. Smith, 7 Cush. 375, 382; Chenery v. Waltham, 8 Cush. 327; Hunt on Boundaries, (3rd Ed.), 306."

The Court adds:

"There are also moral considerations which should prevent any disturbance of long recognized boundary lines; considerations springing from regard to the natural sentiments and affections which grow up for places on which persons have long resided; the attachment to country, to home and to family, on which is based all that is dearest and most valuable in life." * * *

"The compact in this case having received the consent of Congress, though not in express terms, yet impliedly, and subsequently, which is equally effective, became obligatory and binding upon all the citizens of both Virginia and Tennessee. **Nor is it any objection that there may have been errors in the demarcation of the line which the States thus by their compact sanctioned. After such compacts have been adhered to for years neither party can be absolved from them upon showing errors, mistakes or misapprehension of their terms, or in the line established; and this is a complete and perfect answer to the complainant's position in this case."**

In Louisiana v. Mississippi, 202 U. S. 1, 53, the Court said:

"Moreover, it appears from the record that the various departments of the United States Government have recognized Louisiana's ownership of the disputed area; that Louisiana has always asserted it; and that Mississippi has repeatedly recognized it, and not until recently has disputed it.

> The question is one of boundary, and this Court has many times held that, as between the States of the Union, long acquiescence in the assertion of a particular boundary and the exercise of dominion and sovereignty over the territory within it should be accepted as conclusive, whatever the international rule might be in respect of the acquisition by prescription of large tracts of country claimed by both. Virginia v. Tennessee, 148 U. S. 503; Indiana v. Kentucky, 136 U. S. 479; Missouri v. Kentucky, 11 Wall. 395; Rhode Island v. Massachusetts, 4 How. 591."

Maryland v. West Virginia, 217 U. S. 1, is directly in point. This case involved an attempt on the part of the State of Maryland to substitute a new meridian line as her western boundary in lieu of a line for many years generally acquiesced in and accepted as the actual boundary. The long established boundary line was irregular, contained many offsets and was not even intended as an interstate boundary line at the time it was surveyed. It was contended by Maryland and apparently not disputed by West Virginia, that the survey of the new meridian contended for by Maryland was much more accurate than the old established and recognized line. West Virginia contended that the long recognized line was the boundary notwithstanding its jogs, irregularities, imperfections and different location and regardless of the fact that it was not intended as a fixation of an interstate boundary line when it was surveyed. The Court sustained the claims of West Virginia and caused the long recognized boundary to be resurveyed and remonumented by commissioners.

In the opinion, after referring to the doctrine laid down by this Court in previous cases and quoting extensively from the authorities, this Court said:

"An application of these principles can not permit us to ignore the conduct of the States and the belief of the people concerning the purpose of the boundary line known as the old state, or Deakins line, and to which their deeds called as the boundary of their farms, in recognition of which they have established their allegiance as citizens of the State of West Virginia, and in accordance to which they have fixed their homes and habitations. * * *.

The effect to be given to such facts as long continued possession 'gradually ripening into that condition which is in conformity with international order', depends upon the merit of individual cases as they arise. I Oppenheim International Law, Sec. 243. In this case we think a right, in its nature prescriptive, has arisen, practically undisturbed for many years, not to be overthrown without doing violence to principles of established right and justice equally binding upon States and individuals. Rhode Island v. Massachusetts, 12 Pet. 657. * * *.

Upon the whole case, the conclusions at which we have arrived, we believe, best meet the facts disclosed in this record, are warranted by the applicable principles of law and equity, and will least disturb rights and titles long regarded as settled and fixed by the people most to be affected."

IV.

The Carpenter survey has no legal status as a boundary line because it was made without the consent of the State of Colorado, never received the approval of the state, was rejected by Congress and has always been disregarded by every department of the government of the United States.

New Mexico claims that the Carpenter line is the boundary between the states because it represents a more accurate location of the position of the 37th parallel of north latitude than does the Darling-Major line, although it is conceded by the witnesses for New Mexico that it is not an exact fixation of the parallel and that the Carpenter line deflects in a number of places from the actual parallel (pp. 543, 548-549, 582-583, 625).

But irrespective of the question of accuracy, the Carpenter line is not the legal boundary. At the time of its execution Colorado had been a state for more than a quarter of a century with her southern boundary on the Darling-Major line. The Carpenter line is located almost entirely upon the soil of Colorado and its execution was a trespass upon her territory. The survey was made without the consent of Colorado, has never been accepted but has always been disregarded by the state as marking her southern boundary. The mere fact that Carpenter made an *ex parte* survey is of no binding force.

The Carpenter survey was reported to Congress and an effort was made to confirm it by resolution and thereby to establish it as the boundary by legislation. The purpose of the resolution was to establish a new and different boundary from the then existing and recognized Darling-Major line. That this could not be done without the

consent of the State of Colorado was at once recognized by the Attorney General of the United States, who so advised the President. The opinion of the Attorney General, set forth in the veto message of the President, is as follows:

> "I have the honor to report, with respect to joint resolution S. R. 78, referred by you to this department, that the purpose of the said resolution appears to be to correct the boundary line between the Territory of New Mexico and the States of Colorado and Oklahoma. The practical effect of establishing the new boundary line, so far as the State of Colorado is concerned, would be to remove from the jurisdiction of that State and add to the Territory of New Mexico a strip along nearly the whole of the southern boundary of the said State, in which there are located at least five post-offices and an appreciable number of inhabitants.
>
> So far as I am aware no action has been taken by the legislature of the State of Colorado assenting to or accepting the location of the boundary as proposed in this resolution, and from such inquiry as I have been able to make in the very limited time since the resolution reached me, I am led to think that such assent or acceptance on the part of the State is improbable. Under these circumstances, I think it is of very doubtful expediency to have the line mentioned in the resolution accepted by the United States as the true boundary. It is not necessary to express an opinion as to the legal effect of such a resolution upon the rights of the United States or of the Territory of New Mexico, or the duties of federal or territorial officers; but it is clear that the resolution would not be binding upon

> the State of Colorado, and its adoption might lead to conflicts of jurisdiction within the long strip of territory to which I have referred, and possibly to the escape from legal punishment of those guilty of crimes, committed within the said strip. If it is deemed desirable to establish the true boundary line, an appropriate method to effect this would be to invoke by appropriate proceedings, the original jurisdiction of the Supreme Court. I therefore respectfully advise that the joint resolution in question do not receive your signature."

The refusal of Congress to sanction the proposed change in the boundary, left the boundary line as it then stood, as it was when originally established by Darling and Major, and as it was when Colorado was admitted into the Union.

Neither Congress by directing a resurvey, nor the General Land Office by causing the survey to be made has performed an act which is binding upon the State of Colorado, in the absence of its recognition or ratification of these acts.

The Carpenter line is now abandoned.

V.

The Darling-Major line is the legal boundary between the two states and the Court should appoint commissioners to restore the Darling monuments unlawfully destroyed by Carpenter and to reestablish and remonument the boundary.

Colorado by her cross-bill prays that the Court take such measures as may be necessary to correctly restore, reestablish and remonument the Darling-Major line as the boundary between the states.

Pursuant to his instructions Carpenter destroyed a large number of the monuments set by Darling in 1868 and obliterated the marks on the Macomb monument. In each case he gives the location of the destroyed or mutilated monument by bearing references to the monument established by him (see Carpenter field notes attached to bill of complaint). The Carpenter monuments are standing and the location of the Darling monuments may be ascertained by competent engineers by consulting the Carpenter and Darling field notes and by search. The General Land Office of the United States has restored a number of the Darling monuments and has retraced the Major line from the southwest corner of Kansas to the Macomb monument. (See maps, Colorado Exhibits 6 to 16, inclusive, p. 536 of the record, and plaintiff's Exhibit 12, p. 792, also field notes, plaintiff's Exhibit 11, pp. 714 to 792.)

At present the most conspicuous monuments are those set by Carpenter, while throughout the boundary there are two sets of monuments paralleling each other. Confusion will reign until the true boundary is officially monumented in an unmistakable manner and the Carpenter monuments removed.

The Carpenter survey is abandoned and its monuments should not be left to vex and confuse future generations.

CONCLUSION.

The State of Colorado insists that this Honorable Court should by its judgment and decree declare and establish the line as surveyed by Darling and Major to be the legal boundary between the two states and that, pursuant to the prayer of her cross-bill, the Court should appoint commissioners to remonument, reestablish and restore the line of the said surveys as such boundary line.

Respectfully submitted,

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OLIVER DEAN,
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CHARLES ROACH,
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Solicitors for the Defendant.

DELPH E. CARPENTER,
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SUPREME COURT OF THE UNITED STATES.

No. 12, Original.—October Term, 1924.

The State of New Mexico, Complainant,
vs.
The State of Colorado.

[January 26, 1925.]

Mr. Justice Sanford delivered the opinion of the Court.

This is a suit in equity, within the original jurisdiction of this Court, brought by the State of New Mexico against the State of Colorado, in 1919, to settle a controversy as to the location of their common boundary line. Under the Acts of Congress under which they were admitted into the Union and their respective Constitutions, this is the 37th parallel of north latitude between its intersections with the 103rd and 109th meridians of longitude west from Greenwich.[1]

The only dispute is as to the location of this line. Different surveys have been made. New Mexico alleges in its bill that the true line is that which was surveyed and marked by Howard B. Carpenter in 1903, and prays that this be decreed to be the boundary. Colorado, in an answer and cross bill, alleges that the true line is that which was surveyed and marked by Ehud N. Darling in 1868, and extended by John J. Major and Levi S. Preston in 1874 and 1900; and prays that this line be decreed to be the boundary, and that, in so far as necessary, it be restored and remarked.

The case has been heard on evidence taken by examiners, supplemented by a stipulation of the parties. The material facts are these: The Territory of New Mexico was established in 1850,[2] and the Territory of Colorado in 1868.[3] Under the Acts of Congress their

[1] The 26th and 32nd meridians west from Washington. Colorado: Act of Mar. 3, 1875, c. 139, 18 Stat. 474; Constitution, Art. I. New Mexico: Act of June 20, 1910, c. 310, 36 Stat. 557; Constitution, Art. I, Sec. 2.

[2] 9 Stat. 447, c. 49.

[3] 12 Stat. 172, c. 59.

1861

common boundary was the 37th parallel, between the 103rd and 109th meridians.

In 1867 Congress made an appropriation for the "survey of the thirty-seventh parallel of north latitude, so far as it constitutes the northern boundary of the Territory of New Mexico."[4] The Commissioner of the General Land Office employed Ehud N. Darling, a surveyor and astronomer, to make this survey. He made the survey in 1868, and filed his field notes in the Land Office. In accordance with his instructions, he adopted as the northeast corner of New Mexico a stone monument that had been established by Capt. J. N. Macomb, an Army Engineer, in 1859, to mark the intersection of the 37th parallel with the 103rd meridian, and, taking this as his beginning point, surveyed and marked the line of the parallel, as determined by astronomical observations and calculations for latitude, westwardly to the 109th meridian, a distance of over 331 miles. As shown by the field notes he established on this line eleven "astronomical monuments", with "mile corners", usually marked stones, at the end of each mile where the nature of the ground made this possible, otherwise locating the mile corners by triangulation. In 1869 the Commissioner of the General Land Office approved these field notes, and published an official "Map of the Boundary Line between Colorado & New Mexico on the 37th Parallel North Latitude," made in conformity to them.

Several years later the Commissioner of the General Land Office employed John J. Major, a surveyor and astronomer, to survey and mark the remaining portion of the southern boundary of the Territory of Colorado, extending along the 37th parallel to the 102nd meridian. Major made this survey in 1874, and marked the line of the parallel between the Macomb monument and that meridian. The field notes of this survey were filed in the Land Office and approved by the Commissioner.

In 1876 the State of Colorado was admitted into the Union, with the same southern boundary line as that of the Territory.[5]

Some years later the 103rd meridian was established on a line known as the "Cimarron Meridian", intersecting the 37th parallel a short distance east of the Macomb monument. Thereafter the United States Surveyor General employed Levi S. Preston, a

[4] 14 Stat. 457, 466, c. 167.

[5] President's Proclamation, Aug. 1, 1876, 19 Stat. 664. See note 1, *supra*.

deputy surveyor, to resurvey and retrace the north boundary of New Mexico between the Macomb monument and the Cimarron meridian. Preston made this survey in 1900, retracing and remarking this portion of the Major line, and established at the intersection of that line and the Cimarron meridian, about two miles east of the Macomb monument, a sandstone corner since known as the Preston monument. The field notes of this resurvey were filed in the office of the Surveyor General and approved by him.

In 1901 the State of Colorado appointed a commissioner to resurvey and remark a portion of its southern boundary line as surveyed and established by Darling, on which one of his astronomical monuments had disappeared and a number of mile corners could not be found.[6] Both the Territory of New Mexico and the Interior Department were invited to join in this resurvey, but neither did so; and it was made by the Colorado commissioner alone.

In 1902 an examiner of surveys in the General Land Office, on an inspection of about sixty miles of Darling's original line, reported that but few of the corners then remained, and that the line was evidently erroneously established between identified monuments; and the Commissioner urged that the entire southern line of Colorado be resurveyed and reestablished. Thereupon, on the recommendation of the Secretary of the Interior,[7] Congress made an appropriation for "the resurvey and reestablishment, on the line of the thirty-seventh parallel of north latitude, of the boundary line between the State of Colorado and the Territories of New Mexico and Oklahoma" between the 102nd and 109th meridians.[8] The Commissioner of the General Land Office employed Howard B. Carpenter, a surveyor and astronomer, to make this resurvey. He was not directed to retrace the lines previously established, but to make an independent survey, and was specifically instructed to "obliterate" all evidences of the corners and monuments that had been set by Darling. Carpenter completed this resurvey in 1903, and filed his field notes in the

[6]Colorado Laws, 1901, c. 37.

[7]57th Cong., 1st Sess., H. R. Doc. No. 604.

[8]Act of July 1, 1902, 32 Stat. 552, 574, c. 1351. The 37th parallel was also the common boundary of Colorado and Oklahoma, between the 102nd and 103rd meridians.

Land Office in 1904. These were approved by the Commissioner. Carpenter surveyed an entirely different line from the Darling and Major-Preston lines. His new line commenced on the 109th meridian, at some distance north of the Darling line, and ran for the greater portion of the boundary north of that line, although crossing it shortly before reaching the Macomb monument and running for the remainder of the distance somewhat to the south of the Darling and Major-Preston lines. Taken as a whole, its effect, if established as the boundary, would be to transfer a large strip of territory from Colorado to New Mexico, including the greater portions of one town and two villages, and five post offices. Carpenter established on his new line eight stone astronomical monuments, and mile corners, marked by iron posts, wherever it was practicable; and whenever he found one of Darling's mile corners or astronomical monuments, after noting its location, either destroyed it completely or obliterated the marks upon it.

After the Commissioner's approval of the Carpenter line the General Land Office ceased to recognize the Darling and Major-Preston line as the boundary between Colorado and New Mexico in so far as related to the public lands, as it had theretofore done, and for a time recognized the Carpenter line as the boundary.

In 1908 Congress passed a Joint Resolution accepting the line of the Carpenter survey "as the proper location of the thirty-seventh parallel and the true boundary line" between the States of Colorado and Oklahoma and the Territory of New Mexico.[9] This resolution was, however, vetoed by the President; and no further action was taken by Congress.

After this veto by the President the General Land Office abandoned its recognition of the Carpenter line, and thereafter continued to recognize the Darling and Major-Preston line as the boundary.

In 1912 the State of New Mexico was admitted into the Union, with the same northern boundary line as that of the Territory.[10]

In 1917 about forty miles of Darling's original line included in the resurvey that had been made by the Colorado commissioner, were resurveyed and restored under the direction and with the approval of the Commissioner of the General Land Office.

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[9]60th Cong., 2d Sess., Sen. Doc. No. 604.

[10]President's Proclamation, Jan. 6, 1912, 37 Stat. 1723. See note 1, *supra*.

In addition to the foregoing matters the stipulation of the parties recites:—"That, except as may otherwise be shown by the record in this case as now made, for more than thirty years the position of the Darling line, from the Macomb Monument to the . . . 109th meridian of longitude West from Greenwich, remained undisputed and the correctness of its technical execution unquestioned, and, as so established, the said Darling line has been recognized and acquiesced in by the United States, by the Territory and State of Colorado, by the Territory of New Mexico and by the State of New Mexico except as otherwise indicated by the bringing of this suit, and has been and is now recognized and accepted by the Land Department of the United States, in its surveys of the public domain, as the boundary line between Colorado and New Mexico from the Macomb Monument westward, except so far as may otherwise appear (if it does otherwise appear) by the record in this case; that from 1868 to the present time the Territory and later the State of Colorado . . . has claimed and exercised dominion and sovereignty, and now claims the same, over the territory down to the boundary as established by said Darling and no farther; that county lines have been formed, towns and settlements have grown up, school districts, election districts, voting precincts, and land districts and water districts have been created with reference to said line; public officers have been elected, property has been assessed and taxes levied and collected under the authority of the Territory and State of Colorado, and its courts of both civil and criminal jurisdiction have exercised jurisdiction in all places north of said Darling line and the Territory and State of New Mexico has exercised like jurisdiction in all places south of said line; that government postoffice[s] have been established as being in Colorado when north of said line and as in New Mexico when south of said line, and that public land surveys on both sides of said line have been closed thereon, lands have been disposed of, rights acquired and political boundaries in both Colorado and New Mexico have been fixed by reference to said line. That since 1874 the Major survey and marking of the 37th parallel of North latitude . . . westward to the Macomb Monument has been the recognized and accepted South boundary of Colorado between said points and since the acceptance of the Preston survey, retracement and remarking of said line, in the year 1901, said line as remarked and retraced by Preston between said Macomb

Monument and the Preston Monument, at the intersection of said parallel with the Cimarron Meridian, has been and now is the recognized and accepted boundary between Colorado and New Mexico at all points between said Monuments."

There is some evidence, of a very general nature, as to the relative correctness of the location of the line of the 37th parallel as established by Darling, Major and Preston, and by Carpenter. It may well be that neither is entirely correct. We have no occasion, however, to determine this question, or to settle the precise location of the parallel line as an original matter, since, upon the uncontradicted facts, it is entirely clear that the line of the parallel as surveyed and marked by Darling westwardly from the Macomb monument, and by Major and Preston from the Macomb monument to the Preston monument, must be now taken as the established boundary between the two States.

There is no question as to the portion of this line between the Macomb monument and the Preston monument, since it is expressly agreed that since this line was surveyed by Major in 1874 and resurveyed by Preston in 1901 it "has been and now is the recognized and accepted boundary between Colorado and New Mexico at all points between said Monuments."

The remainder of the line as surveyed and marked by Darling from the Macomb monument to the 109th meridian, must likewise be held to be the recognized and established boundary.

From 1868, when Darling ran and marked the line of the 37th parallel, to 1919, when this suit was brought, a period of more than half a century, his line was recognized and acquiesced in, successively, as the boundary between the two Territories, between the State of Colorado and the Territory of New Mexico, and between the two States. In *Missouri* v. *Iowa*, 7 Howard 660, which involved the location of the boundary line between the two States running with "the Indian Boundary line," it was held that governments are bound by the practical line that has been established as their boundary, although not precisely a true one; and that as the United States before either of the States had been admitted into the Union and after Missouri had been admitted but while Iowa still remained a Territory, had recognized and adopted the line of a certain survey as the "Indian boundary line" and was committed to that line as the boundary of Missouri, Iowa when admitted was bound by the

recognition and adoption of that line by the United States, her predecessor, and could not be heard to disavow it as the boundary. So here, the United States, from 1868 to 1876, while still owning the public domain and having paramount jurisdiction as to territorial boundaries, recognized and adopted the Darling line as the true location of the parallel and the boundary between the two Territories, and thereafter, from 1876 to 1912, while retaining paramount jurisdiction as to New Mexico, recognized this line as the boundary between the State of Colorado and the Territory of New Mexico; and the State of New Mexico on being admitted into the Union was bound by the previous recognition and adoption of this line by the United States, her predecessor, and cannot be heard to disavow the boundary thus recognized. The effect of this recognition of the Darling line by the United States was not impaired by the temporary recognition of the Carpenter line by the General Land Office, from 1904 to 1908. The United States had resumed its recognition of the Darling line several years before New Mexico was admitted as a State. Further, after Colorado had been admitted into the Union in 1876 its right to rely upon the line previously established could not be impaired by any subsequent action on the part of the United States. Thus, after the Land Department has surveyed and disposed of public lands, the rights therein acquired are not affected by corrective surveys subsequently made by the Department. *United States* v. *Investment Co.*, 264 U. S. 206, 212, and cases there cited. And, independently of these matters, New Mexico is bound by its own recognition and adoption of the Darling line, from 1912 to the beginning of this suit, after its admission to statehood. *Missouri* v. *Iowa, supra*, p. 677.

It results that the bill of New Mexico, praying the establishment of the Carpenter line, must be dismissed; and that, under the cross bill of Colorado, the Darling and Major-Preston line must be decreed to be the boundary between the two States.

This boundary line should now be resurveyed and remarked by a commissioner or commissioners appointed by the court; such action to be subject to its approval. *Missouri* v. *Iowa, supra*, p. 679; *Indiana* v. *Kentucky*, 136 U. S. 479, 519; *Oklahoma* v. *Texas*, 260 U. S. 606, 640.

The parties may submit within thirty days the form of a decree to carry these conclusions into effect.